NO. 90-960

In the Supreme Court of the United States

OCTOBER TERM, 1990

JAMES C. CATHEY and BETTE CATHEY,
Petitioners

V.

THE DOW CHEMICAL COMPANY MEDICAL CARE PROGRAM,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

CITATION OF SUPPLEMENTAL AUTHORITY

The primary point Petitioners have made is that consideration of this petition is justified because in the related state court suit the Texas courts held that all remedies under state law are preempted, including relief sought under provisions of the Texas Insurance Code explicitly regulating the practices of insurers in selling policies and handling claims. The Texas Supreme Court on January 30, 1991, unanimously affirmed the decisions of the lower courts. The issue of preemption is now ripe for consideration.

The majority opinion in *Cathey v. Metropolitan Life Insurance Co.*, __S.W.2d__, 34 Tex. Sup. Ct. J. 309 (Jan. 30, 1991), relied on this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987), to hold that

even if Article 21.21 of the Texas Insurance Code could be considered within the "saving" clause of ERISA, the statute would still be preempted because of the Texas court's view that under *Pilot Life* ERISA provides the exclusive remedy, notwithstanding the language of the saving clause. (Slip op. at 7-8). This is precisely the sort of analysis anticipated in the Catheys' petition for writ of certiorari. (*See* Petition 27-28). The concurring opinion in *Cathey v. Metropolitan* noted the "deplorable" result of eliminating state remedies under laws expressly regulating insurance, but even the concurring justices felt no alternative existed in light of their construction of decisions from this Court.

As pointed out by the concurring opinion in *Cathey v. Metropolitan*, ERISA affects over fifty-six million Americans who are enrolled in group health insurance plans. As the Dow Program's response points out, this Court has found ERISA sufficiently important to grant review on a number of occasions to expound on the expansiveness of ERISA preemption. *See Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983); *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987); *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990). The same pervasive importance of ERISA reflected by the grant of review in these cases warrants review in the present case.

The procedural posture of this case, now that the Texas Supreme Court has ruled, presents a unique opportunity for this Court to fill in vital missing parts of the ERISA equation. This Court has written extensively on preemption. Now is the time for the Court to define the limits, if any, of that preemption.

The question presented by the Texas Supreme Court's decision is whether ERISA can preempt a state law regulating unfair insurance practices that was enacted pur-

suant to the McCarran-Ferguson Act, even though the "saving" clause of ERISA explicitly saves from preemption "any law of any State which regulates insurance." Specifically, can such a statute be preempted as conflicting with ERISA's enforcement scheme, when Congress explicitly stated that such state laws were not to be preempted?

As framed by the Texas Supreme Court in *Cathey v. Metropolitan*, and cases cited in that opinion, the issue turns on the proper reading of *Pilot Life*. When this Court went on to hold that additional, inconsistent remedies were preempted, after the Court already held the common law remedy at issue was not "saved" as a law regulating insurance, was the second holding perhaps overly-broad dicta that has been improperly expanded beyond the context of *Pilot Life*? Or, did this Court mean to hold in *Pilot Life* that even a state law that fits within ERISA's express saving clause is nevertheless preempted? If the former construction is correct, then *Cathey v. Metropolitan* and a score of other cases are wrong and need to be reversed and disapproved. If the latter reading prevails, this Court needs to explain how the saving clause can be effectively read out of ERISA in deference to the preemption clause, especially in light of *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985), and the more recent decision in *FMC Corp. v. Holliday*, 111 S. Ct. 403 (1990).

The Catheys' concession, and the Dow Plan's argument, that the preemption issue was not yet ripe for review are no longer correct. As shown by the appended opinions and judgment of the Texas Supreme Court, the time to decide the preemption question is now. The preemption issue is a question of far-reaching importance, which the Catheys will present more fully in their petition for certiorari in *Cathey v. Metropolitan*.[1]

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[1] This petition is due to be filed by April 30, 1991.

The second important issue, which is directly presented by the pending petition, is the question of what remedies and rights beneficiaries are to have under ERISA if all state remedies are in fact preempted.

This Court's ERISA jurisprudence to this point has been for the most part limited to decisions that forbid as preempted various state law remedies and regulations. The Court has also held that lower courts are to develop a federal common law of rights and remedies to protect participants and beneficiaries under ERISA plans. The Court has not had an opportunity, until now, to give meaning to that mandate. This case squarely presents the opportunity for the Court to give life to the promise of meaningful rights and remedies under the federal common law of ERISA.

As previously briefed, the problem with the opinion of the court of appeals in this case is that the court entirely failed to adopt, acknowledge, or apply any legal principles in reaching or explaining its decision denying the Catheys recovery under ERISA.

The two questions presented in this case and in *Cathey v. Metropolitan* are inextricably related. If the Court determines that all state laws are preempted, even those aimed at regulating insurance sales and claims handling, then definitive guidance on the scope and development of remedies and rights under the common law of ERISA is urgently needed. Otherwise, this Court's preemption holdings merely create a vacuum in which insurers can act with almost complete impunity, because all state laws are preempted, and federal law is impotent. On the other hand, if the Court applies the saving clause to reject preemption of state laws regulating insurance, the continued vitality of state law protections allows for more orderly development of federal common law, and such state law remedies provide the analytical base for developing

meaningful federal common law remedies.

The Catheys respectfully pray that this Court grant review in this case, or stay consideration of this petition, consolidate the two cases for review, and then grant review of both petitions.

II.

REPLY TO RESPONDENT'S BRIEF

One misstatement that appears throughout the Dow Program's response is the contention that the district court's fact findings were not disturbed on appeal. (*See* Response 2 n. 1, 8-9 n. 6, 10). The relevance of this assertion is not clear, but the assertion is clearly wrong, whatever the relevance.

The Dow Program asserts three bases for the claim denial: (1) the nurse's services were not medically necessary; (2) the services were primarily custodial; and (3) the services could be performed by a person without professional training. (Response 4). These bases were accepted and affirmed by the district court (App. 32-33). However, the Fifth Circuit rejected each of these grounds. The Fifth Circuit characterized as "draconian" the Dow Program's position that the performance of gratuitous custodial services along with skilled nursing services allowed the administrator to deny all compensation, 907 F.2d at 557 (App. 17), and the court rejected that position as being not supported by the language of the plan. *Id.* at 561 (App. 27-28). The Fifth Circuit also dismissed the Dow Program's "self-serving" assertions that certain training and professional skills were required of the nurse. *Id.* at 557 & n.4 (App. 18).

The point of this appeal is that the Fifth Circuit disagreed with the grounds for denial asserted by the Dow Program and disagreed with the essential conclusions

drawn by the district court, but still denied the Catheys any relief. The Fifth Circuit grounded its decision on its interpretation of the plan documents as governing in-home nursing services *exclusively* under the "Home Health Care" language of the New Plan, without regard to the alternate language covering services of a registered nurse that were prescribed by a physician. The Fifth Circuit, *sua sponte,* read the "Personal Physician" language as covering only "non-home" medical services. 907 F.2d at 561 (App. 26-27).

The Dow Program admits this was not the issue upon which the parties tried the case (Response 8-9), and the Fifth Circuit's interpretation was not one ever advanced by the Dow Program or the district court. In fact, the Dow Program disavows the Fifth Circuit's holding, by stating:

> It is not now, nor has it ever been the Dow Program's position that all nursing services are covered under the home Health Care provision. Indeed, registered nursing services are clearly listed under the Personal Physician provision[.]
> . . .

(Response 11 n. 10).

The Dow Program also provides a complete rebuttal to the Fifth Circuit's view that the Home Health Care language was the exclusive provision governing *in-home* medical services. The Dow program admits that it paid for *in-home* therapy services performed by Nurse Jurek at 80% under the services prescribed by a "Personal Physician" language of the New Plan. (Response 10-11 & n. 10). Yet *in-home* therapy services are covered at 100% by the Home Health Care provision as well (App. 59), just as nursing services are covered by *both* the Home Health Care and Personal Physician provisions of the New Plan. (App. 59-61). The Dow Program's own admitted practice of paying for

in-home therapy services under the Personal Physician provision renders absurd the Fifth Circuit's holding that the Home Health Care provision exclusively governed in-home medical services.

By ignoring the interpretation given to the contract by the Dow Program, the Fifth Circuit violated one of the basic tenets of contract construction, the rule providing tha the meaning given by the parties will control. As previously briefed, the Fifth Circuit's construction, by failing to articluate or adopt any principles of federal common law, also ignored the rule that the plain meaning of the contract should control, the rule that the interpretation given by the contract's drafter is entitled to great weight, and the rule requiring that related contracts are to be construed together, especially as in this case when the provisions of the Old Plan and New Plan appeared in the same document.

The Dow Program halfheartedly asserts that the Fifth Circuit did apply the "plain meaning" rule, but the Dow Program does not and cannot assert that the Fifth Circuit's application of that rule was correct. Significantly, nowhere in its brief does the Dow Program argue that the Fifth Circuit's interpretation of the documents was right. Instead, as set forth above, the Dow Program disavows and rebuts the interpretation given by the Fifth Circuit.

The reason the Dow Program cannot embrace the Fifth Circuit's holding, and the reason this Court should not allow the Fifth Circuit's decision to stand is that quite simply the words appearing in the same plan document cannot have different meanings on different days. The Dow Program paid for Nurse Jurek's in-home nursing services for over two years under the language of the Old Plan promising coverage for registered nursing services prescribed by a physician. There is simply no principle under which those same services could not be covered under the same

language in the New Plan.[2]

Simply mouthing and misapplying the "plain meaning" rule of contract construction is hardly what this Court could have intended when it instructed lower courts to develop a body of federal common law principles to govern rights and remedies under ERISA.

The Fifth Circuit expressly rejected the grounds given by the Dow Program and the district court for denial of the Catheys' claim. The Dow Program disavows the basis the Fifth Circuit has given for upholding the denial. Yet the Catheys still lose.

Unable to embrace the erroneous construction given by the Fifth Circuit, the Dow Program instead tries to argue that this is really such a small case as to be unworthy of review. The Catheys vehemently disagree. No one disputes the debilitating physical harm being endured by Bette Cathey, but the decision of the Fifth Circuit does not harm only the Catheys. This case is of broad public importance, as well. The need for meaningful, fair principles of federal common law to govern ERISA claim determinations affects every claim and every claimant under ERISA.

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[2] There is one principle that could explain the result, but it is hardly one the Dow Program is likely to embrace or that this Court would endorse.

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master — that's all."

L. Carroll, *Through the Looking-Glass and What Alice Found There*, ch. 6 (1865).

The Catheys do not just disagree with the result reached by the Fifth Circuit; the entire process by which that decision was reached is indicted. The Catheys have shown that if the Fifth Circuit had applied any meaningful, fair principles of federal common law, based upon universally accepted principles of contract law, the result could not have been reached.

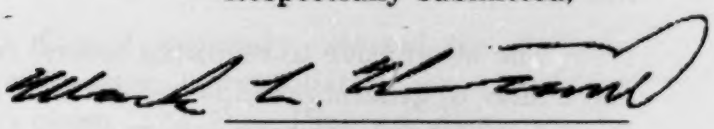
The alternative to requiring federal courts to adopt and adhere to general principles of contract interpretation, applied as federal common law in ERISA cases, is that there will be no compass by which to decide these cases. ERISA purports to give a remedy for benefit denials, but the lack of any standards to govern judicial review makes any such remedy arbitrary and wholly discretionary. This can hardly be what Congress intended when it enacted ERISA to "promote the interest of employees and their beneficiaries in employee benefit plans" and "to protect contractually defined benefits."

It is somewhat hollow to argue, as the Dow Program does, that this ERISA case is merely a private dispute of little public importance, when one considers the raft of ERISA decisions issued by this Honorable Court. The fifty-six million Americans whose health safety net is ERISA are entitled, at bare minimum, to a federal common law embracing universally accepted rules of contract construction.

The Catheys respectfully pray that this Honorable Court grant their petition in this case to clarify the duty of federal courts to adopt and apply federal common law principles to govern rights and liabilities under ERISA. The Catheys further pray that consideration of this petition be consolidated with their forthcoming petition in *Cathey v. Metropolitan*, presenting the issue of preemption of state insurance laws. Ultimately, the Catheys pray that this Court hold that the Catheys' state insurance law remedies

are saved from preemption and that under properly applied principles of federal common law, the Catheys are entitled under ERISA to the benefits they claim.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX A

IN THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY and BETTE CATHEY	§	
Petitioners	§	FROM HARRIS COUNTY
v.	§	
	§	FIRST DISTRICT
METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO. and MICHAEL H. MADDOLIN	§	
Respondents	§	

OPINION

This is an appeal in a case involving "ERISA," the Employees' Retirement Income Security Act of 1974. 29 U.S.C. §§ 1001-1461 (1988). An employee and his wife brought state law claims against his employer and its insured for alleged wrongful denial of a claim for in-home nursing care. The trial court granted a summary judgment to the defendants. The court of appeals affirmed the judgment of the trial court. 764 S.W.2d 286. We are called upon to decide whether causes of action stated under: 1) article 21.21, section 16 of the Texas Insurance Code; 2) section 17.50(a)(4) of the Texas Deceptive Trade Practices Act; and 3) article 3.62 of the Texas Insurance Code are superseded by the provisions of ERISA. We hold that ERISA preempts these causes of action in this case. We therefore affirm the judgment of the court of appeals.

FACTS

Because this is a summary judgment case, the facts shown by the Catheys are taken as true. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). James Cathey was employed as a purchasing agent for Dow Chemical Company ("Dow") from 1973 to 1983. During his tenure at Dow, Cathey was told by Dow representatives that he and his wife, Bette Cathey, were covered by a group insurance plan (the Dow plan). In the mid-1970's Bette Cathey was diagnosed with multiple sclerosis, and her condition worsened so that eventually she could no longer walk without assistance. In 1982, Bette Cathey's physicians ordered home nursing care for her. These expenses were paid for under the group insurance plan covering Dow employees. In 1985, Metropolitan Life Insurance Company ("Met"), acting as the claims administrator for the Dow plan, refused to continue paying for the nursing care. Cathey contacted Michael Maddolin, group claim consultant with Met, who told him that there was no medical necessity for nursing care for Bette Cathey.

The Catheys filed suit against Dow, Met, and Michael Maddolin alleging common law and statutory causes of action; no ERISA causes of action were stated. The trial court found each cause of action to be preempted by ERISA and, following the Catheys' refusal to amend their petition to state an ERISA cause of action,[1] rendered summary judgment in favor of Dow, Met, and Maddolin. The court of appeals affirmed that judgment.

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[1] The Catheys filed a separate ERISA suit against the Dow Chemical Company Medical Care Program during the pendency of this action. We note that the Fifth Circuit handed down its decision in that case on August 3, 1990, holding that the Catheys were entitled to partial recovery on their ERISA claim. *Cathey v. Dow Chemical Co. Medical Care Program*, 907 F.2d 554 (5th Cir. 1990).

ERISA

The Employee Retirement Income Security Act of 1974 subjects employee benefit plans to federal regulation. The act regulates both pension plans and welfare plans that provide benefits for contingencies such as illness, accident, disability, death, or unemployment. While it provides standards and rules governing reporting, disclosure, and fiduciary responsibility for pension and welfare plans, ERISA does not mandate any particular benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90-91 (1983).

Section 1144(a) of ERISA provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

This section is informally known as the "preemption" provision of ERISA. It is narrowed in scope by subsection 1144(b)(2)(A), commonly known as the "saving" clause:

> Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities.

Subparagraph 1144(b)(2)(B), the "deemer" clause, modifies the saving clause by providing that no employee benefit plan:

> shall be deemed to be an insurance company or other insurer . . . for purposes of any law of any state purporting to regulate insurance companies.

The operation of these provisions has been succinctly explained by the United States supreme Court:

> To summarize the pure mechanics of the provisions quoted above:
> If a state law "relate[s] to . . . employee benefit plan[s]," it is pre-empted. The saving clause excepts from the pre-emption clause laws that "regulat[e] insurance." The deemer clause makes clear that a state law that "purport[s] to regulate insurance" cannot deem an employee benefit plan to be an insurance company. (citations omitted).

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987).

Section 1001(b) of Title 29 declares that it is the policy of ERISA to protect:

> the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b) (1988). In *Pilot Life*, the Supreme Court explained that the preemption provision of ERISA was intended to have the effect of "reserv[ing] to Federal authority the sole power to regulate the field of employee benefit plans." 481 U.S. at 46 (quoting Representative Dent, 120 Cong. Rec. 29197 (1974)).

THE DISPUTE

The Catheys contend that misrepresentations made

by representatives of both Dow and Met are actionable under the Texas Insurance Code and Deceptive Trade Practices Act ("DTPA"). They argue that their claims do not "relate to" an employee benefit plan and thus are not preempted. In the alternative, the Catheys assert that even if their claims do relate to an employee benefit plan within the meaning of the preemption provision, they are preserved by the saving clause as laws regulating insurance.

Dow, Met, and Maddolin assert that section 16 of article 21.21 and article 3.62 of the Texas Insurance Code, and section 17.50(a)(4) of the DTPA are state laws that "relate to" an ERISA plan and are therefore preempted. They further contend that the causes of action alleged by the Catheys are not saved from preemption by the saving clause because they conflict with the civil enforcement scheme provided in ERISA and are therefore displaced. Both Dow and Met pleaded ERISA preemption in their answers; Maddolin did not.

"RELATE TO"

A state law, defined in section 1144(c)(1) to include all laws, decisions, rules, regulations, or other action having the effect of law, is preempted by ERISA only if it "relates to" a plan. 29 U.S.C. § 1144(a) (1988). We must therefore begin with the fundamental inquiry: When does a state law relate to an employee benefit plan?

The United States Supreme Court has loosely defined the parameters of the "relate to" requirement. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection or reference to such a plan." *Shaw*, 463 U.S. at 96-97. Also the Court declared that "[t]he phrase 'relate to' was given its broad commonsense meaning." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985). The Court has

repeatedly stated that the words "relate to" should be construed expansively. *See Shaw,* 463 U.S. at 96-97; *Pilot Life,* 481 U.S. at 46-48; *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 8 (1987). ERISA preemption applies not only to state laws but to all forms of state action dealing with the subject matters covered by this federal statute. 29 U.S.C. § 1144(c)(1) (1988); *see also Shaw,* 463 U.S. at 98. In keeping with this broad interpretation, the Court held that a cause of action for wrongful termination related to an ERISA plan where it was based on the allegation that the employer fired the employee to avoid paying benefits under a pension plan. *Ingersoll-Rand Co. v. McClendon,* 111 S. Ct. 478 (1990).[2]

Given these declarations by the Supreme Court, courts have not hesitated to find that state laws having an effect on employee benefit plans relate to such plans and are therefore preempted by ERISA. *See, e.g., Ramirez v. Inter-Continental Hotels,* 890 F.2d 760 (5th Cir. 1989); *Boren v. N.L. Indus.,* 889 F.2d 1463 (5th Cir. 1989), *cert. denied.*, 110 S. Ct. 3283, 111 L. Ed. 2d 792 (1990); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters.,* 793 F.2d 1456 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987); *Kanne v. Connecticut Gen. Life Ins. Co.,* 867 F.2d 489, *cert. denied* 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); *Misic v. Building Serv. Employees Health & Welfare Trust,* 789 F.2d 1374 (9th Cir. 1986); *Juckett v. Beecham Home Improvement Prods., Inc.,* 684 F. Supp. 448 (N.D. Tex. 1988); *E-Systems, Inc. v. Taylor,* 744 S.W.2d 956 (Tex. App.—Dallas 1988, writ denied); *Giles v. Texas Instruments Employees Pension Plan,* 715 S.W.2d

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[2] Also, we note that the Supreme Court handed down *FMC Corporation v. Holliday* contemporaneously with *McClendon,* 111 S. Ct. 403 (1990). However, that opinion does not impact our decision in this case. In *Holliday,* the Court considered whether a state law prohibiting subrogation claims fell within ERISA's insurance saving clause. The state law did not conflict with ERISA's exclusive remedy scheme.

58 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Felts v. Graphic Arts Employee Benefits Trust,* 680 S.W.2d 891 (Tex. App.—Houston [1st Dist.] 1984, no writ). "Because of the breadth of the preemption clause and the broad remedial purpose of ERISA, 'state laws found to be beyond the scope of [the preemption provision] are few.' " *Cefalu v. B.F. Goodrich Co.,* 871 F.2d 1290, 1294 (5th Cir. 1989).

The common law claim in *Pilot Life* was not alleged against the employee benefit plan, but against the insurance company that administered the plan. Nevertheless, the Court noted that the cause of action clearly related to a plan and was thus preempted. 481 U.S. at 47-48; *see also Ramirez,* 890 F.2d at 760, 762-63 (suit brought against former employer and its insurance carrier held to be preempted); *Cefalu,* 871 F.2d at 1292-93 (suit related to an ERISA plan even though it was alleged against the former employer and not the plan). The Catheys' claim for nursing care was made and denied pursuant to the Dow plan's terms, and they appealed this denial under the internal review provisions of the plan. We hold that the Catheys' claims against Dow and Met relate to an employee benefit plan; the claims are thus preempted unless a contrary result is mandated by the saving clause.

ERISA'S EXCLUSIVE REMEDY SCHEME v. THE SAVING CLAUSE

The Catheys assert that even if their claims relate to an employee benefit plan, they are saved from preemption by section 1144(b)(2)(A), the saving clause. The saving clause saves from preemption state laws which regulate insurance. *Metropolitan Life,* 471 U.S. at 737; *Pilot Life,* 481 U.S. at 47. However, even the saving clause cannot save from preemption a state law that provides remedies not provided by ERISA. In *Pilot Life,* the Supreme Court announced that ERISA's civil enforcement remedies were

intended to be exclusive. 481 U.S. at 54. *Pilot Life* involved allegations of improper processing of a claim for benefits. In holding that the plaintiff's claim for breach of the Mississippi common-law duty of good faith and fair dealing was preempted by ERISA, the court stated, "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.; see also McClendon,* 111 S.Ct. at 484-85; *Mutual Life Ins. Co. v. Yampol,* 840 F.2d 421, 425 (7th Cir. 1988).

Even if these insurance code provisions and the DTPA provisions were subject to the saving clause, the Court's opinions in *Pilot Life* and *McClendon* held that Congress intended all suits alleging improper claims processing be governed only by ERISA. *McClendon,* 111 S.Ct. at 485; *Pilot Life,* 481 U.S. 52-54. Section 16 of article 21.21 and article 3.62 of the Insurance Code and section 17.50(a)(4) of the DTPA provide recovery that was not included under ERISA. The Court has decided that ERISA's civil enforcement scheme could not be supplemented by state law remedies. Therefore, a statutory remedy for improper claims processing is not available against an ERISA plan or its administrator.

CONCLUSION

The Catheys seek to recover remedies not available under ERISA's civil enforcement provisions. Therefore, even if the provisions in question could be said to regulate the business of insurance for purposes of ERISA preemption analysis, they would still be preempted as laws that provide remedies that are inconsistent with the civil enforcement provisions provided in ERISA. *See Pilot Life,* 481 U.S. 51-57; *Massachusetts Mutual Life Ins. Co. v.*

Russell, 473 U.S. 134, 146 (1985); *Ramirez*, 890 F.2d at 764; *Kelley v. Sears, Roebuck & Co.*, 882 F.2d 453, 456 n.2 (10th Cir. 1989); *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 3216, 106 L. Ed. 2d 566 (1989); *In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1194 (8th Cir. 1988); *Anschultz v. Connecticut Gen. Life Ins. Co.*, 850 F.2d 1467, 1469 (11th Cir. 1988); *Juckett v. Beecham Home Improvement Prods.*, 684 F. Supp. 448 (N.D. Tex. 1988); *McManus v. Travelers Health Network*, 742 F. Supp. 377 (W.D. Tex. 1990); *Commercial Life Ins. Co. v. Superior Court*, 764 P.2d 1059 (Cal. 1988), *cert. denied sub nom, Juliano v. Commercial Life Ins. Co.*, 109 S. Ct. 2087, 104 L. Ed. 2d 651 (1989). Accordingly, we hold that Texas Insurance Code section 16 of article 21.21 and article 3.62 as well as DTPA section 17.50(a)(4) are preempted by the provisions of ERISA in the context of the facts of this case. Dow and Met properly pleaded ERISA preemption in their answers; Maddolin did not. We agree with the court of appeals, however, that the preemption of the Catheys' claims against Dow and Met extends to Maddolin because he acted as Met's employee in the course of its business. We therefore affirm the judgment of the court of appeals.

RAUL A. GONZALEZ
Justice

OPINION DELIVERED: January 30, 1991

Concurring opinion by Justice Doggett joined by Justices Mauzy, and Gammage.

SUPPLEMENTAL APPENDIX B

IN THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY AND BETTE CATHEY, Petitioners,	§	
	§	FROM HARRIS
v.	§	COUNTY
	§	
	§	FIRST DISTRICT
METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO. and MICHAEL H. MADDOLIN, Respondents.	§	

CONCURRING OPINION

In one brief writing the court today is forced to eliminate the rights of hundreds of thousands of Texas families to protect themselves from false, misleading, and deceptive practices in the handling of health and disability insurance claims. These are rights that had been secured by consumer protection statutes properly enacted by the Texas Legislature and that remain in effect today for those Texans who obtain their coverage directly from insurers rather than through their employers. Unfortunately, there is little that I or any other member of this court can do about this deplorable demise of state-given rights other than to lament their passage.

Recognizing that *Ingersoll-Rand v. McClendon,*

— U.S. —, 111 S. Ct. 478 (1990), and *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), control this case, I must concur with the court's opinion. By its reading of ERISA's preemption clause, the United States Supreme Court has restricted the very rights of employees—to avoid the delay or denial of benefits—that Congress sought to protect. Through peculiar federal judicial interpretation, a statutory addition to workers' rights has been converted into a statutory removal of those rights. The law has been reshaped into a form that achieves the converse of its original purpose. Identical claims are now treated differently depending on whether the claimant is insured individually or through an employer. Those insured through their employers are denied by ERISA preemption the safeguards afforded by Texas to their fellow citizens. I join with the growing number of courts and commentators who express the concern that through continued misconstruction, ERISA has become "quicksand" that "will continue to expand and to preempt everything in its meandering path." *Jordan v. Reliable Ins. Co.*, 694 F. Supp. 822, 835 (N.D. Ala. 1988). For the over 56 million Americans who are enrolled in group health insurance plans like the one in which James Cathey was a member,[1] ERISA has become more than mere quicksand; it has become a black hole.

Through ERISA, Congress sought "to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire." H. Rep. No. 807, 93d Cong., 2d Sess. 3, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4670. The measure responded to increasing abuses against workers caused by irresponsible management of pension and welfare benefit funds. In its "declaration of policy," Congress noted:

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[1] U. S. Census Bureau, 1990 Statistical Abstract 413 (1990).

> that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits.

29 U.S.C. § 1001(a) (1974). The primary objective of the legislation was "to increase the rights of employees by imposing strict fiduciary duties on employers and benefit plan administrators and by providing the employees with the civil remedies in section 502(a)." Note, *Punitive Damages and ERISA: An Anomalous Effect of ERISA's Preemption of Common Law Actions,* 65 Wash. U.L.Q. 589, 609 (1987).

In view of this laudable goal, several commentators have expressed dismay at the paradox that has arisen since *Pilot Life:* the workers ERISA was intended to protect lack a remedy for wrongs unaddressed by the statute, while the companies targeted by Congress employ ERISA as an effective shield against responsibility for wrongful processing of claims. The first manifestation of this incongruous result is that workers covered by group benefit plans have been denied state causes of action that had been available prior to the Act's passage. *Id. See also,* Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux,* 21 Loy. L.A.L. Rev. 1343, 1381 n.303 (1988) (hereinafter Note, *Blind Faith*) (observing the lack of Congressional intent to preempt state causes of action for breach of a covenant of good faith and fair dealing). Second, persons covered by group benefit

plans are limited to ERISA's remedies, while individual insurance policyholders retain the full range of state remedies. *Id.* at 1347.[2] The harm is exacerbated by the reality that employees seldom have a voice in selecting their company's group insurer. Whether taken separately or together, these developments evince a disturbing disregard for Congress' overriding intent to protect the participants and beneficiaries of group benefit and pension plans. Their aim is best served by reading ERISA's remedies as a floor rather than a ceiling, and by respecting the traditional deference given to state insurance regulations as mandated by the McCarran-Ferguson Act, 15 U.S.C. § 1011. Under ERISA, insurers who provide group benefit plans have little incentive to deal promptly and fairly with employee participants.[3] Indeed, for ERISA to

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[2]The Supreme Court reinforced a third curious distinction—that between self-insured plans and those that obtain insurance from regulated insurance companies—in *FMC Corp. V. Holliday*, — U.S. —, 111 S.Ct. 403 (1990), discussed in the majority opinion, *supra*, — S.W.2d at — n.1. This distinction was introduced by the Court in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). In his dissent to *Holliday*, Justice Stevens describes the distinction as "broad and illogical," and adds:

> Had Congress intended this result, it could have stated simply that 'all State laws are pre-empted insofar as they relate to any self-insured employee plan.' There would then have been no need for the 'saving clause' to exempt state insurance laws from the pre-emption clause, or the 'deemer clause,' which the Court today reads as merely reinjecting into the scope of ERISA's pre-emption clause those same exempted state laws insofar as they relate to self-insured plans.

Holliday, — U.S. at —, 111 S. Ct. at 411 (Stevens, J., dissenting).

[3] Under 29 U.S.C. § 1132, ERISA plan participants or beneficiaries harmed by a lengthy delay in, or unreasonable denial of, benefits may bring a time-consuming and expensive action in court to recover no more than the benefits due under the plan. § 1132(a)(1)(B). The award of attorney's fees is possible, but solely within the discretion of the court. § 1132(g)(1).

preempt all state law that may be loosely defined as "relating to" employee benefit plans is "counterproductive to ERISA's objective of furthering, rather than debilitating, progressive employment law." Gregory, *The Scope of ERISA Preemption of State Law; A Study in Effective Federalism,* 48 U. Pitt. L. Rev. 427, 457 (1987).

Moreover, expansive preemption of state common law and statutes regulating the insurance industry upsets the equilibrium between the federal government and the states that Congress intended to preserve by enacting the saving clause, 29 U.S.C. §1144(b)(2)(A), thereby eviscerating this once-important provision. In *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724 (1985), the clause was initially given vitality by acknowledgment of the well-established rule that "[t]he presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope." *Id.* at 741. The presumption against preemption is particularly strong with respect to those areas, such as insurance, "traditionally regarded as properly within the scope of state superintendence." *Florida Lime and Avocado Growers v. Paul,* 373 U.S. 132, 144 (1963); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977).

In *Metropolitan Life,* while state-mandated policy inclusion of mental health coverage was related to the business of insurance and therefore within the scope of preemption, the saving clause directed that the law not be preempted. 471 U.S. at 739, 746-47. In so holding, the Court analyzed the legislative history of ERISA, and noted that the final version of the law included a preemption clause more broadly worded than those in the original versions submitted to the Conference Committee by the two houses of Congress. Rather than halting its analysis at that point, as it did in *Pilot Life,* 481 U.S. at 46, the Court pro-

ceeded to conclude that this expansion of the preemption clause "gave the insurance clause a much more significant role, *as a provision that saved an entire body of law from the sweeping general pre-emption clause.*" *Metropolitan Life,* 471 U.S. at 745 n.23 (emphasis added). The Court's holding thus refused to "impose any limitation on the saving clause beyong those Congress imposed in the clause itself." *Id.* at 746.

In contrast to the *Metropolitan Life* Court's careful deference to Congress' intent to balance the preemption and saving clauses, the *Pilot Life* opinion added a consideration that tips the balance of federalism inexorably away from the states by reducing the saving clause analysis to an empty exercise. The Court interpreted ERISA's legislative history to support the notion that Congress had intended that the statute's remedies be exclusive. This holding was drawn from the statements of several members of Congress to the effect that ERISA was meant to "preempt the field." 481 U.S. at 46. Congress' intent that ERISA provide exclusive remedies, however, was subordinate to its effort to provide greater protections to workers covered by pension and welfare benefit plans. When viewed in the light, the preemption clause should be given no more than equal consideration with the saving clause, which remains to preserve state regulation of insurance that is equally meant to safeguard the interests of workers.[4] Instead, as one commentator asserts, "the *Pilot Life* Court gutted the saving clause of meaning." Note, *Blind Faith, supra,* at 1382.

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[4] The Court correctly observed in *Metropolitan Life:* "While Congress occasionally decides to return to the States what it has previously taken away, it does not normally do both at the same time." 471 U.S. at 740. It seems that where ERISA is concerned, the Court has created an exception to this principle.

Refusing an interpretation of *Pilot Life* that would require the preemption of a California statute regulating the bad faith conduct of insurers, one court appropriately concluded that to do so "would rewrite the saving clause to read: 'Nothing in this subchapter *except section 1132* shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . .' The Supreme Court strongly indicated in *Metropolitan Life* that this is not the law." *Graves v. Blue Cross*, 688 F. Supp. 1405, 1412 (N.D. Cal. 1988) (emphasis in original). Unfortunately, this interpretation has now been rejected by *McClendon*. *Pilot Life* and *McClendon* thus seize from the states the ability to "deter[ ] insurance companies from exploiting insureds when they are most financially vulnerable." Note, *Blind Faith, supra*, at 1397.

By affirming *Pilot Life's* unfortunate mischaracterization of Congressional intent, the Supreme Court in *McClendon* takes another step away from the goals of federalism. States are no longer the laboratories of democracy[5] when it comes to protecting their consumers. States have been thwarted in their efforts to fill the federal void left in the regulation of insurance companies that provide benefit plans under ERISA. Gregory, *supra*, at 457. Ironically, this gap was initially created by the Congress in the McCarran-Ferguson Act, 15 U.S.C. § 1011, which entrusts to the States the regulation of "the business of insurance."

This federal court deprivation of state law protections stands in notable juxtaposition with the professed goal of some in Washington to return power to the states. The Texas courts and the Texas legislature are powerless

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[5] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

to preserve the rights of workers covered by group benefit plans. Texans have little recourse but to petition their federal legislators to correct what has been an errant jurisprudential path. The time is long past for Congress to reconsider the expanse of ERISA and to resurrect the authority of the states to provide additional protections to their citizens.

LLOYD DOGGETT
Justice

Justices Mauzy and Gammage join in this concurring opinion.

OPINION DELIVERED: January 30, 1991

SUPPLEMENTAL APPENDIX C

THE SUPREME COURT OF TEXAS
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John T. Adams, Clerk

Received
Feb 4, 1991

February 1, 1991

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RE: Case No. C-8323
Style: JAMES C. CATHEY and BETTE CATHEY v. METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO., and MICHAEL MADDOLIN

Dear Counsel:

Enclosed is the judgment of the Supreme Court of Texas as said judgment appears in the Minutes of this Court. This is the judgment that will issue in mandate form to the lower court if no motion for rehearing is filed or if a filed motion for rehearing is overruled.

Sincerely,

John T. Adams, Clerk

by /s/ Peggy Littlefield
Peggy Littlefield,
Chief Deputy

SUPPLEMENTAL APPENDIX D

THE SUPREME COURT OF TEXAS

NO. C-8323

JAMES C. CATHEY and BETTE CATHEY Petitioners	§	FROM HARRIS COUNTY
v.	§	FIRST DISTRICT
METROPOLITAN LIFE INSURANCE CO., DOW CHEMICAL CO. and MICHAEL H. MADDOLIN Respondents	§	

JUDGMENT

THE SUPREME COURT OF TEXAS, having heard this cause on writ of error to the Court of Appeals for the First District, and having considered the appellate record and the argument of counsel, is of the opinion that the judgment of the court of appeals should be affirmed.

IT IS THEREFORE ORDERED, in accordance with the Court's opinion, that:

1) The judgment of the court of appeals, which affirmed the summary judgment rendered by the trial court for Metropolitan, Dow and Maddolin, is affirmed;

2) Metropolitan Life Insurance Co., Dow Chemical Co. and Michael H. Maddolin shall recover from James C. Cathey and Bette Cathey, who shall pay, the costs in this Court and in the court of appeals.

A copy of this judgment and of the Court's opinion is certified to the court of appeals and to the District Court of Harris County, Texas, for observance.

(Opinion of the Court delivered by Justice Gonzalez)
(Concurring Opinion by Justice Doggett joined by Justice Mauzy and Justice Gammage)

January 30, 1991

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